NO. 20250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON,

Appellant,

v.

GLENN ROSE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Appellant,	)	NO. 20250
v.	)	
GLENN ROSE, Appellee.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, Warden of the California State Prison at San Quentin, respondent

in the court below and custodian of the appellee Glenn Rose, from an order of the United States District Court for the Northern District of California, Southern Division. The order granted appellee's application for a writ of habeas corpus and remanded him to the Superior Court of the State of California for the County of Alameda for further proceedings not inconsistent with the opinion of which the order of remand was a part.

Proceedings in the State Courts

Appellee was charged in a complaint filed on April 1, 1958, in the Municipal Court for the Berkeley-Albany Judicial District, County of Alameda, State of California with assault by means of force likely to produce great bodily harm in violation of California Penal Code section 245. A preliminary examination was conducted on April 17, 1958, at which time appellee was held to answer in the Superior Court of the State of California for the County of Alameda (CT 167-68).

An information was filed by the District Attorney of Alameda County charging appellee in three counts with kidnapping in violation of section 207 of the California Penal Code, assault by means of force likely to produce great bodily harm in violation of section 245, and sex perversion in violation of section 288a. He entered a plea of not guilty to these charges on May 8, 1958 (CT 168).

On June 9, 1958, appellee withdrew his pleas of not guilty and entered pleas of guilty to the charges of kidnapping and assault. The District Attorney's motion to dismiss the charge of a violation of Penal Code section 288a was granted (CT 132-35). On July 16, 1958, probation was denied and appellant was sentenced on each charge to be imprisoned in the state prison for the term prescribed by law, the sentences to be served concurrently (CT 138-42). Throughout these proceedings, appellee was represented by Gartner S. Thomas, his privately retained attorney (RT 132-48, 167-69).

An appeal was taken from this judgment to the District Court of Appeal for the First Appellate District. On June 8, 1959, Division Two of that court affirmed the judgment. See People v. Rose, 171 Cal. App. 2d 171; 339 P.2d 954 (1959).

Numerous other applications for relief have been filed in the state courts. An application for a writ of error coram nobis (motion to vacate the judgment) was denied by the Alameda Superior Court on September 14, 1961. An appeal to the District Court of Appeals from the denial of this application was dismissed on February 13, 1962, in action No. 4084. On April 11, 1962, the California Supreme Court denied a hearing.

An application for a writ of habeas corpus was

denied by the Superior Court for the County of Marin on February 3, 1961, in action No. 33641. An application for a writ of habeas corpus in the District Court of Appeal was denied on March 13, 1961 in action No. 3940. The California Supreme Court denied a petition for writ of habeas corpus in action No. 6909 on July 5, 1961. A second application for a writ of habeas corpus was denied by the Marin County Superior Court in action No. 36273 on July 25, 1962 (CT 1-2).

At the suggestion of this court in its opinion in Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964) petitioner reapplied for habeas corpus to the California Supreme Court on March 26, 1964. Following a full evidentiary hearing before a referee, that court denied the writ on February 2, 1965. In re Glenn Rose, 62 Cal. 2d 384, 42 Cal.Rptr. 236, 398 P.2d 428 (1965).

In all of the foregoing petitions for coram nobis and habeas corpus, petitioner raised the issues of the adequacy of representation by his chosen counsel.

Proceedings in the Federal Courts

Appellee's first application for habeas corpus in the federal courts was filed in the District Court in October 1962. Subsequently, on March 6, 1963, Judge Stanley A. Weigel issued an opinion and order denying the writ. A certificate of probable cause was granted

and an appeal was taken to this court. This court affirmed the denial of the writ of habeas corpus solely on the ground that petitioner failed to exhaust state court remedies. Rose v. Dickson, supra, 327 F.2d 27 (9th Cir. 1964).

Following the denial by the California Supreme Court of appellee's application for a writ of habeas corpus, he returned to the District Court with a second petition filed on March 12, 1965 (CT 1). An order to show cause issued and respondent-appellant filed a return on May 13, 1965 (CT 152, 154). On July 9, 1965, the District Court issued its order remanding petitioner to the Superior Court of the State of California for the County of Alameda after holding that appellee had been deprived of the effective aid of counsel to which he was constitutionally entitled (CT 167-71). Appellant's application for a certificate of probable cause was granted and a notice of appeal was filed on July 19, 1965 (CT 174-78, 180).

Upon application of appellant, this court entered its order on August 2, 1965, staying the execution of the District Court's order until disposition of this appeal. Appellee has been admitted to bail by the District Court (CT 182-83).

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STATEMENT OF FACTS

The District Court decided this case upon a reporter's transcript of proceedings before a Referee appointed by the California Supreme Court and a stipulation as to the verity of appellee's former attorney. No further evidentiary hearing was conducted and no suggestion is or has been made by either party that a further hearing was required.

Appellee's Contentions and Evidence

Two basic contentions were made in the court below. First, it was contended that petitioner was denied the effective assistance of counsel to which he was constitutionally entitled in that, prior to the entry of the plea of guilty, appellee's privately retained attorney did not investigate the circumstances of the case, did not discuss possible defenses with appellee, and did not advise appellee of the consequences of a guilty plea, of the possibility of a term of imprisonment, nor of the maximum sentences which might be imposed. Further, it was alleged that the attorney unequivocally advised appellee that, if he pled guilty, he would be granted probation (CT 2-3). Second, it was contended that the judge of the Superior Court who accepted appellee's plea of guilty failed to inquire into his understanding of the nature and possible consequences of such a plea and that

the Fourteenth Amendment required the judge to make such an inquiry (CT 3-4).

Interestingly enough, appellee did not testify. The sole witness in his behalf was his former attorney, Gartner S. Thomas. Mr. Thomas was admitted to practice in 1936 (CT 83). Appellee was his client in several civil matters covering a period of from 8 to 10 years preceding 1958. The frequency of professional visits varied. Thomas testified, "Sometimes there would be a year between them and sometimes two or three years between them. They weren't very frequent." They did not see each other socially (CT 48, 58, 86).

Thomas could not recall how many criminal cases he handled in the 22 years he was in practice prior to 1958. However, he estimated that in the five years preceding appellee's case, he handled four or five criminal matters, one of which was a felony case, a narcotics prosecution in which probation was granted (CT 83-84).

The direct examination was very brief. Thomas testified that he advised appellee that he would be granted probation if he pled guilty; that he did not advise him that he might be imprisoned if he pled guilty nor what the maximum term of imprisonment might be; and that he did not discuss any possible defenses which might

have been urged (CT 46-47).

Thomas testified on cross-examination that appellee came to his office on the day he was released on bail following his arrest. He said they consulted for about a half hour and that appellee ". . . just told me what had happened . . . with this girl." Thomas could not recall the details of the story. He did recall that appellee said he ". . . went to this girl's house and picked her up and they had a quarrel . . . ." (CT 46, 51, 54). At this time appellee said he was going to plead not guilty (CT 54).

Thomas testified that he next saw appellee at the arraingment. The District Attorney's office requested a continuance until April 8, 1958. On April 8th appellee entered his plea of not guilty. On neither of these occasions was there any discussion of the facts of the case (CT 52-53).

The preliminary examination was held on April 17, 1958. Thomas testified that, on the way to court, he told appellee that he would listen to what the complaining witness had to say. He said that this was about the extent of the conversation before the hearing (CT 54). Following the preliminary examination, Thomas asked appellee about the testimony of the complaining witness. Appellee replied that her testimony was not true. Thomas

did not ask appellee about any specific testimony (CT 55). He said he thought he questioned the complaining witness about her consent to the alleged acts (CT 69).

It was Thomas' recollection that he did not ask for the police reports concerning the incident. He said he did not read the victim's statement nor did he interview her. He did view the photographs of the victim at the preliminary examination (CT 61-62).

Thomas testified that the next time he saw appellee was the day prior to the latter's arraignment in Superior Court. Appellee came to his office and indicated that he wanted to enter a plea of not guilty (CT 56-57). A not guilty plea was entered on May 8, 1958 (CT 56).

After entry of the plea, Mr. Thomas spoke to Deputy District Attorney John Baldwin and Inspector Arthur K. Smith of the Albany Police Department. He called Baldwin and asked whether the District Attorney's office would move to dismiss the oral copulation charge if appellee pled guilty to the kidnapping and assault charges. He said he also asked Baldwin if he thought "it would be a case for probation." Baldwin called back in a "couple of days" and stated that the District Attorney's office would move to dismiss the sex perversion charge and that they would have no objection to probation. He also stated

that he thought probation was possible in this case. Thomas stated Baldwin indicated they would not recommend probation, but only that there was a possibility of probation and that they would have no objection to it (CT 62-63).

Thomas testified he saw Inspector Smith on the street as the latter passed by his office. He inquired whether appellee had any previous record and was informed that he had none. The question of probation was discussed. Thomas inquired whether appellee might be granted probation if he pled guilty. Inspector Smith replied that, since appellee had no prior record, they would have no objections to probation and that he didn't see any reason why he should not be placed on probation. Smith did not state that they would recommend probation (RT 57-59).

Thomas thereafter advised appellee to withdraw his pleas of not guilty, to plead guilty to the two charges and ask for probation. He advised appellee that he though he would get probation and discussed with him the reasons why he concluded that probation would be forthcoming.

> "Upon those conversations [with Deputy District Attorney Baldwin and Inspector Smith] and upon the fact that Mr. Rose had no previous record, upon the

fact that his victim, this incident occurred with this girl that he had been associated with, and to me, this was a thing between the two people, and on the further fact that I knew previously to this time he had no record and I was pretty sure he would get probation. That is what I felt, and I felt that something had been accomplished, that we had got rid of that serious charge of 288a, and that is the reason why I advised him to change his plea and to ask for probation." (CT 64, see also CT 86).

He further told appellee that he thought he would get probation because the case was merely a "quarrel between two people" and that he wasn't an "ordinary criminal." (CT 66).

Thomas reiterated that he did not discuss possible defenses with appellee (CT 47, 67). He was, however, familiar with the fact that appellee had been dating the victim for a period of time prior to the alleged offense. He further indicated that the question of consent by the victim concerned him and that he believed he asked some questions along this line at the preliminary examination (CT 67-69).

Thomas also testified on cross-examination that he did not research the maximum terms of imprisonment

and did not advise appellee of the fact that there was a possibility that he would be sentenced to imprisonment. He said he did not do so because he was confident appellee would receive probation (CT 78-81). However, Thomas acknowledged that the possibility of imprisonment in appellee's case was quite obvious (CT 78-79). He considered the charges to be serious and that ordinarily they would be punishable by a sentence to state prison (CT 81-82). He explained, however, that he did not consider appellee's case as one in which a prison sentence would be likely. He said:

> "But the only reason I didn't in this case was because, as I stated before, because of the facts surrounding it, they were going together, and he having no previous record, and he wasn't a man I hadn't known before. I had known he had been a good citizen up to this time. If I may say, if it had been a case where a man had been in trouble before and there had been no situation where they had been going around together, I would have taken a different attitude towards it, but in this case I thought there was an exception." (CT 82: 4-13).

Thomas stated that it was for the above-quoted reasons that he did not discuss the possibility of imprisonment or the maximum term of imprisonment with appellee (CT 82).

Prior to entering the plea of guilty, appellee told Thomas that he was considering employing another attorney prior to making his decision. Thomas advised him not to do so because he was confident that he was going to get probation. Appellee did not indicate why he wanted to talk to another attorney (CT 95). At no time did appellee indicate to Thomas that he recognized his guilt (CT 94-95). Thomas did not accept a fee for his services. A check for $75 was returned (CT 86-87).

It was stipulated that attorney Thomas testified truthfully, to the best of his recollection and belief (CT 165-66).

Appellant's Contentions and Evidence

The position of appellant, respondent in the court below, was twofold: First that the representation afforded by appellee's chosen counsel was not constitutionally inadequate; and second, that even if it were inadequate appellee was not denied due process of law because there was no action or inaction by the State of California which can be characterized as "state action" under the Fourteenth Amendment to the United States Constitution (CT 145-160). As might be expected, appellant must also rely upon the testimony of appellee's attorney in connection with the claim of inadequate representation, since we were in no position to produce

evidence bearing upon this claim.

Inspector Arthur K. Smith of the Albany Police Department was called by appellant and testified that he knew Gartner Thomas for 20 years and that he saw him almost daily. He knew him socially as well as professionally (CT 96, 105). Smith was familiar with the case against appellee, though he was not the investigating officer (CT 96, 99). He did not tell Thomas that appellee could be assured of probation (CT 101). While he was unsure whether the conversation took place before sentencing or after, Smith recalled that he told Thomas that he thought the offense was "damned vicious" and that he personally thought that appellee should not get probation (CT 103-04). He thought the discussion concerning probation took place after the case was concluded (CT 99). However, he said the conversation concerning probation could have occurred prior to the imposition of sentence (CT 105-06).

Deputy District Attorney, John Baldwin, who would have been the trial deputy had appellee's case gone to trial, also testified (CT 106). Baldwin said he spoke to Gartner Thomas and that they "discussed the merits of the case." (CT 111, 113). He testified that he did not tell Thomas that appellee's case was a "case for probation." Nor did he believe that he told Thomas that he thought the

liklihood of probation was strong (CT 107). While he was not sure of the exact content of the conversation because of the lapse of time, he thought that the conversation concerned the legal eligibility of appellee for probation rather than whether appellee would receive probation. He definitely did not tell Thomas that his office would recommend probation (CT 108, 130-31). He did not recall whether he told Thomas that they would oppose probation. He stated that, "as a practical matter, we don't in our county take a stand too often." (CT 108). Based upon habit, he believed he said that the question of punishment was for the court. He believed appellee was eligible for probation and so advised Thomas (CT 112-15).

SUMMARY OF APPELLANT'S CONTENTIONS

This case presents issues of profound importance concerning the role of an attorney in handling a criminal case. The District Court has held that the efforts of appellee's privately retained attorney were constitutionally inadequate. However, another judge of the District Court and a unanimous California Supreme Court previously held that the attorney's efforts were sufficient to meet constitutional standards of competency. Appellant asks this court to reverse the order of the District Court upon three grounds:

1. That appellee's voluntary plea of guilty precludes collateral attack upon his judgment of conviction upon the ground that he was not represented by competent counsel;

2. That the District Court erred in holding that appellee's chosen attorney failed to measure up to constitutional standards of adequate representation of a defendant in a criminal case; and

3. That even if appellee was not afforded adequate representation, his conviction cannot be upset under the Fourteenth Amendment because, the State of California through its officers did not deny him effective assistance of counsel for his defense.

ARGUMENT

I

APPELLEE'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK UPON HIS JUDGMENT OF CONVICTION ON THE GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL

Appellee entered a plea of guilty to kidnapping and assault by means of force likely to produce great bodily harm upon expectations of leniency and the prosecutor's agreement to move to dismiss the serious charge of forcible oral copulation. He now asserts that, because his chosen attorney's representation failed to meet constitutional standards of adequate representation, his conviction

must be overturned. Granting, arguendo, that the representation does not meet minimal constitutional standards of competency, that fact does not afford a basis for overturning a conviction based upon a voluntary plea of guilty. Appellee's conviction is based upon his voluntary plea of guilty and not upon the asserted inadequate representation.

The Court of Appeals for the District of Columbia has incisively analyzed this problem. In Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958), cert. denied, 358 U.S. 847 (1958), a federal prisoner appealed from the denial of a motion under Title 28 U.S.C. § 2255. He alleged that his attorney met with him on only one occasion; that he did not weigh the facts of the case, did not prepare the case and advised him that there was nothing else to do but plead guilty. The Court of Appeals concluded that there might indeed have been alternative courses open to defense counsel, but concluded that a decision on the question of competency was unnecessary. A clear distinction was made between the role of counsel before trial and at trial. The court stated:

> "It must be realized that this is not a case in which proof of guilt depended upon a trial. In such cases, the accused usually relies to a great extent on counsel to conduct an effective defense,

because the accused does not know enough about the law to do so himself. While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law . . . Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding." [Footnote omitted.] Id. at 709-710. See also, Pinedo v. United States, 347 F.2d 142, 147 (9th Cir. 1965).

This analysis we submit is plainly applicable to the instant case. Thus, even if appellee was represented by incompetent counsel who failed to properly advise him, the fact is relevant only insofar as it sheds light on the voluntariness of the plea of guilty. It is manifest that appellee's plea of guilty was entered

upon an expectation of lenient treatment, i.e., probation, and the bargained-for commitment of the prosecutor to dismiss the charge of forcible oral copulation. The plea was not entered because appellee's counsel failed to explain the patently obvious possibility that appellee could be sentenced to imprisonment or that he failed to discuss with appellee the nuances of possible defenses which might be proffered. The expectation of probation, the dismissal of a charged sex crime and, presumably, the recognition of guilt obviously impelled the plea of guilty.

It is axiomatic that a mere disappointed expectation of leniency does not vitiate a plea of guilty. Pinedo v. United States, supra, 347 F.2d 142, 148 (9th Cir. 1965); Monroe v. Huff, 145 F.2d 249 (D.C. Cir. 1944). It is only where there are promises of leniency or similar commitments by responsible state officers, i.e., the judge or prosecutor, that a plea of guilty otherwise voluntarily entered may be set aside. Machibroda v. United States, 368 U.S. 487, 493 (1962); Pinedo v. United States, supra, 347 F.2d 142, 146 (9th Cir. 1965); In re Atchley, 48 Cal. 2d 408, 310 P.2d 15 (1957). There is no hint of such a promise or commitment in this case.

Since appellee's conviction is predicated upon a plea of guilty entered upon his expectation that probation

would be granted and that a serious charge would be dismissed and not upon the asserted incompetence of his counsel, his judgment of conviction is not open to collateral attack upon the ground that it resulted from ineffective representation by counsel. Cf. Wallace v. Heinze, _____F.2d _____ (9th Cir. No. 19,850, Sept. 15, 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); Thomas v. United States, 290 F.2d 696 (9th Cir. 1961).

As was said in Monroe v. Huff, supra, "The substance of . . . [the evidence] is that he pleaded guilty on the advice of his counsel and received a longer sentence than both hoped. If that were sufficient to show that his plea was not intelligently made few, if any, convictions and sentences would be valid."[1]

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1. It should be noted that In California from 1959 through 1963 approximately 65% of the felony convictions were obtained by pleas of guilty. There were 21,659 such felony pleas in 1963. State of California, Department of Justice, Crime in California, 1963. Preliminary figures for 1964 show 21,334 felony defendants of a total of 32,779 were convicted upon guilty pleas. State of California, Department of Justice, Crime, Delinquency & Probation in California, advance 1964.

II

APPELLEE WAS AFFORDED CONSTITUTIONALLY ADEQUATE REPRESENTATION BY HIS RETAINED ATTORNEY

The District Court concluded that appellee's chosen counsel "totally failed to present the cause of the accused in any fundamental respect." (Emphasis in original), (CT 167). Appellant submits that this conclusion is not supported by the record. Indeed, some of the factual findings upon which this conclusion is based are "clearly erroneous," Rule 52(a), Federal Rules of Civil Procedure, and must be discounted in assessing the adequacy of trial counsel's representation. We consider first the law by which an attorney's representation is to be judged.

Any competency-of-counsel discussion commences with the decisions of the United States Supreme Court interpreting the constitutional right to counsel. These decisions, from Powell v. Alabama, 287 U.S. 45 (1932) to Gideon v. Wainwright. 372 U.S. 335 (1963), are all concerned with the issue of when an attorney must be appointed to represent a defendant in a criminal case. Powell itself, wherein the adjective "effective" first appeared with respect to assistance of counsel, was a case which must be considered as one where no appointment was made. The entire Bar was appointed to represent the defendants -- an appointment which meant nothing since, as has aptly been

said, "what was everybody's business was nobody's business." Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958), cert. denied, 358 U.S. 850 (1958). As Circuit Judge Prettyman stated in speaking for a majority of the Court of Appeals for the District of Columbia in Mitchell, supra,

> "The court has never held that an accused is entitled to representation by a lawyer meeting a designated aptitude test. It has never used the term ["effective" assistance] to refer to the quality of the service rendered by a lawyer . . . The court has not itself undertaken, nor has it imposed upon the inferior federal courts, the duty of appraising the quality of a defense." Mitchell v. United States, supra. But cf. Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289, 293 (1964).

We may and do assume, however, that "there is assuredly a level below which the . . . performance of counsel representing a defendant . . . may not sink or the fourteenth amendment will be encountered." United States ex rel. Darcy v. Handy, 203 F.2d 407, 417 (3rd Cir. 1953); cert. denied, 346 U.S. 865 (1953). The pertinent inquiry then, is to establish the threshold of incompetency --

the level of performance below which an attorney's assistance is, in effect, no assistance at all -- the point at which representation becomes a farce and a sham.

Appellant's review of the cases indicates, for the most part, an ad hoc treatment of claims of incompetent counsel. The guidelines are vague but nevertheless perceptible and a few generalizations may be found in or distilled from the cases.

Plainly, adequate representation does not mean successful representation. "Mere failure to achieve acquittal is no part of a court's consideration of the work of the trial lawyer." Mitchell v. United States, supra, at 792. Nor will a claim of mere errors in judgment or tactics sustain a claim of incompetence -- an attorney is not required to be infallible. United States ex rel. Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), cert. denied, 338 U.S. 809 (1949). Further, the mere fact that a defendant was advised to plead guilty does not establish incompetence. Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965); People v. Robillard, 55 Cal.2d 88, 10 Cal.Rptr. 167, 358 P.2d 295 (1960). Indeed most of the reported cases involve assertions of inadequate representation during trial rather than before entry of a plea

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of guilty.[2/]

The few cases we have discovered where convictions upon guilty pleas have been overturned on grounds of inadequate representation are extreme. Thus, in Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950) counsel consulted with the defendants for not more than 20 minutes in court at the counsel table and apparently did nothing more than advise his clients to plead guilty. People v. Avilez, 86 Cal. App. 2d 289, 194 P.2d 829 (1948) also presented a unique and extreme situation. In that case, the public defender was appointed to represent a defendant charged with numerous felony counts. The court said:

> "The taking of the pleas commenced immediately after the appointment of the public defender. His role with respect to the pleas consisted of informing the court that appellant intended to plead guilty on each of the 32 charges and that

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2. The cases have been collected in a number of articles. See Waltz, Inadequacy of Trial Defense Representation as a Ground for Postconviction Relief in Criminal Cases, supra, 59 Nw. U.L. Rev. 289 (1964); Comment, Effective Assistance of Counsel, 49 Va. L. Rev. 1531 (1963); Comment, Federal Habeas Corpus and Incompetence of Counsel in State Prosecutions, 33 Wash. L. Rev. 303 (1958); Comment, Incompetency of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts, 4 U.C.L.A. L. Rev. 400 (1957); Fellman, The Right to Counsel Under State Law, 1955 Wis. L. Rev. 281, 309-316; Annotation, Incompetency of Counsel Chosen by Accused as Affecting Validity of Conviction, 74 A.L.R. 2d 1390 (1960).

> they waived the reading of all complaints. He did not avail himself of the continuance to which the court told appellant that he was entitled to prepare his defense . . . We think that this fact shows a violation of appellant's basic right to the assistance of counsel for his defense."
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> Id. at 293.

Another extreme situation is found in State v. Osgood, 123 N.W.2d 593 (Minn. 1963). In that case, the Minnesota Supreme Court remanded for further hearing petitioner's claims in a coram nobis proceeding that his attorney, selected by his parents, consulted with him on only one occasion in the corridor outside the courtroom immediately prior to his arraignment at which he pleaded guilty. He alleged that the conference lasted only a few minutes and that he was advised by the attorney to plead guilty since the attorney stated he could only be sentenced to imprisonment for about 2 years, when in fact, the offense carried a mandatory penalty of 5 to 40 years. The court held these allegations warranted a further hearing since they were not fully investigated by the trial court. Numerous cases where courts have refused to overturn convictions based upon guilty pleas where claims of incompetent representation have been made are collected in Annotation, supra, 74 A.L.R. 2d 1390, 1431-1436 (1960).

The case at bar is far from the mark of the extreme situations depicted in the three cases summarized above. When appellee went to attorney Thomas' office, on the day he was released on bail, they consulted for about a half hour and appellee told the attorney "what had happened . . . with this girl." (CT 51, 54). After a plea of guilty to the complaint was entered, the attorney represented appellee at the preliminary examination where he questioned the complaining witness (CT 69). Thereafter a plea of not guilty was entered in the Superior Court, (CT 56), and the attorney commenced negotiations with the district attorney's office attempting to gain a dismissal of the forcible oral copulation charge if appellee were to enter a plea of guilty to the other two charges. The deputy district attorney told Thomas that, while their office would not recommend probation, there was a possibility of probation and they would have no objection to it (CT 62-63). The attorney also discussed the case with Inspector Smith of the Albany Police Department, a close personal friend, who stated that, since appellee had no prior record, the police department would have no objections to probation (CT 57-59).

After the foregoing, the attorney advised appellee to withdraw his plea of not guilty and enter a plea of guilty to the charges of kidnapping and assault. He did

so on the belief that appellee would be granted probation and so advised appellee (CT 64, 66). While the attorney's recommendation may now be considered ill-advised in view of what did happen, that fact certainly does not compel the conclusion that the representation was constitutionally inadequate. What may retrospectively appear to be an error in judgment does not, standing alone, establish incompetency. Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963). If that were true, there would be few members of the Bar who would be able adequately to represent criminal defendants.

At the outset of this argument we alluded to clearly erroneous findings of fact made by the District Court. We consider these now. The District Court found that appellee's attorney "failed to discuss possible defenses or the facts of the case with the accused." (CT 169). These findings are not supported by the record and are belied by common experience. The attorney plainly discussed the facts with appellee. His testimony was that he listened to appellee's version of what happened for about a half hour (CT 51, 54). And while the attorney stated it was his "best recollection" (CT 47) that he did not discuss possible defenses which might be urged, that testimony surely does not establish that possible

defenses were not discussed. For it is evident that any factual discussion of a case between an attorney and his client necessarily includes a "discussion" of possible defenses -- even though they may not be identified and labled as "consent," "entrapment," or like denominations. An attorney's discussion with his client, we would hope, does not have to be carried on in technical language. It is for the attorney to transpose the facts recited by the client into the appropriate terms, when the case goes before the court -- not during initial interviews with the client.

Also noteworthy in this case is the fact that the attorney could not recall the details of the factual discussion with appellee (CT 51-52). He repeatedly used the phrase "my best recollection." We must ask whether claims of incompetence are to be sustained because memories have become fuzzy and hazzy by the passage of time?

The District Court also found that the attorney failed "to pursue any discovery devices available; failed to investigate the case or interview witnesses." Yet the offenses charged necessarily involved but two principal witnesses -- one of whom was the client whom he had interviewed and the other the victim who testified at the preliminary examination. It is common knowledge among California criminal law practitioners that a preliminary

examination serves as an excellent vehicle for discovery. See generally, California Continuing Education of the Bar, California Criminal Law Practice, ch. 6 (1964). Yet if we understand the District Court's opinion, it requires that in every case regardless of the circumstances, an attorney must avail himself of formal discovery techniques or risk being declared incompetent.

Appellant submits that these factual findings are not only clearly erroneous but that, in the entire context of this case, they are irrelevant. Thus, even if there was no discussion of the facts or possible defenses, we submit, as we pointed out in Argument I, that this is relevant only to the issue of the voluntariness of the plea of guilty.

This court has recently decided a case which is remarkably similar to the case at bar. In Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965), the defendant appealed from the District Court's refusal to set aside his plea of guilty. "Pinedo . . . maintained that he would not have pled guilty if he had not been advised by his attorney to do so; that his attorney had assured him that if he pled guilty he would be given probation. . . ." Id. at 145. Assuming such assurances were given, this court held that the refusal to set aside the plea of guilty was not an abuse of discretion. The

court also approved of the District Court's finding that the appellant was afforded "reasonably effective assistance" by his attorney. Id. at 148. We submit that Pinedo alone, compels reversal of the District Court's order.

While from the vantage point of hindsight we may not consider the assistance of appellee's attorney a paragon performance, it was all the Constitution requires. The record conclusively refutes the District Court's opinion that the attorney "totally failed to present the cause of the accused in any fundamental respect." (CT 167). Appellee was not entitled to the perfect assistance of perfect attorney -- he received, we submit, all that this court has said is necessary; that is, "reasonably effective assistance." Brubaker v. Dickson, supra, 310 F.2d 30 (9th Cir. 1962); Pinedo v. United States, supra, 347 F.2d 142 (9th Cir. 1965).

III

APPELLEE WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Even if appellant were to concede that appellee did not receive the assistance of counsel to which he was constitutionally entitled, and that this fact was a basis for upsetting a conviction based upon a guilty plea, his conviction is not thereby invalidated. For he was not denied due process of law by any action or inaction on the

part of the State of California.[3]

It has been repeatedly held, both in this circuit and others, that ineffective representation by privately employed counsel does not constitute state action within the meaning of the Fourteenth Amendment. "The amendment . . . is directed only to action by a state and its command . . . is that the state through its officers shall not deny to a defendant in a criminal case the effective assistance of counsel for his defense." United States ex rel. Darcy v. Handy, 203 F.2d 407, 426 (3rd Cir. 1953), concurring opinion, cert. denied, 346 U.S. 865 (1953). See also, United States ex rel. Wilkins v. Banmiller, 325 F.2d 514, 516 (3rd Cir. 1963), cert. denied, 379 U.S. 847 (1964); Hamilton v. Wilkinson, 271 F.2d 278 (5th Cir. 1959); Application of Hodge, 262 F.2d 778, 780 (9th Cir. 1958); Dusseldorf v. Teets, 209 F.2d 754, 755 (9th Cir. 1954), cert. denied, 347 U.S. 969 (1954); Berg v. Cranor, 209 F.2d 567, 568 (9th Cir. 1954); Ex parte Haumesch, 82 F.2d 558 (9th Cir. 1936); Piascik v. Heinze, 178 F. Supp. 364, 366 (D.C.N.D. Cal. N.D. 1959). See also, Stanley v. United States, 239 F.2d 765, 766 (9th Cir. 1956);

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3. While this point was clearly raised in appellant-respondent's return to the order to show cause in the District Court (CT 148-59), that court's opinion does not consider the issue at all.

Taylor v. United States, 238 F.2d 409, 413-14 (9th Cir. 1956); Morton v. Welch, 162 F.2d 840, 842 (4th Cir. 1947). It is only where representation by a privately retained attorney is so grossly and obviously inadequate that it becomes the duty of the judge or prosecutor to intervene and correct the situation, that state action, or perhaps more accurately state inaction, may be found. See United States ex rel. Darcy v. Handy, supra, at 427; cf. Dayton v. United States, 319 F.2d 742, 743 (D.C. Cir. 1963); Stanley v. United States, supra, 239 F.2d 765 (9th Cir. 1956).

If we assume that appellee's attorney rendered only the most perfunctory service for his client and that the representation was not up to constitutional standards, it is still a defect for which the State of California cannot be held responsible. Appellee -- not the judge or prosecutor -- selected the attorney. While the ineffective efforts of a public defender appointed to represent a defendant may be attributed to the state, Brubaker v. Dickson, supra, no such responsibility can be imposed upon the state where, as here, the attorney is privately retained and offers to plead his client guilty.

In this case, there was no occasion for the judge or prosecutor to be put on notice of the attorney's alleged incompetence. For when appellee and his attorney

appeared and entered a guilty plea, appellee showed no discernible dissatisfaction with this course. Even after the plea was entered and he was remanded to custody, appellee remained mute (CT 135). If appellee was dissatisfied with the advice of his attorney, he certainly had some obligation to bring this fact to the attention of the court. He must repudiate the actions of his attorney, "by making known to the court at the time his objection to or lack of concurrence in them." United States ex rel. Darcy v. Handy, supra, 203 F.2d at 426. See also, United States ex rel. Wilkins v. Banmiller, supra, 325 F.2d at 525, fn. 4, dissenting opinion.

Appellant therefore submits that the District Court erred in impliedly holding that the State of California was responsible for the alleged inadequate representation by appellee's attorney.

CONCLUSION

For the foregoing reasons, appellant submits that the order of the District Court should be reversed and the proceedings dismissed.

DATED: October 19, 1965

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